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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1925

MILLER & SON PAVING, INC.,

Petitioner,

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY, FRANK VIRNELSON, and HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, and WRIGHTSTOWN TOWNSHIP,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Miller & Son Paving, Inc. hereby petitions that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 2, 1979.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit of April 2, 1979, is printed in the Appendix at page A3. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 443 F. Supp. 1268, and is printed in the Appendix at page A10.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 2, 1979. (Appendix, at A1). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. In a civil antitrust suit brought by Miller & Son Paving, Inc., alleging joint and concerted conduct among defendants to restrain trade and injure plaintiff in its business through subversion and abuse of the adjudicatory process, is Miller & Son Paving, Inc. required to allege specifically that there was a "commercial purpose" or a "commercial objective" behind the actions of defendants in order to state a claim under the antitrust laws?

2. In a civil rights suit brought by Miller & Son Paving, Inc., alleging a conspiracy on the part of defendants to prevent the plaintiff from obtaining an objective and neutral adjudication before a zoning tribunal, is a civil rights plaintiff required specifically to plead facts over and above those that are required under the notice pleading requirement of Rule 8 of the Federal Rules of Civil Procedure?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . "

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

The petitioner, plaintiff Miller & Son Paving, Inc. ("Miller"), is engaged in the business of extracting and mining stone and other quarrying activities on two adjacent tracts of land, a 45-acre parcel and a 12-acre parcel, located in Wrightstown Township, Bucks County, Pennsylvania. In August, 1977, Miller filed a complaint in the United States District Court for the Eastern District of Pennsylvania against the respondents Wrightstown Township Civic Association, George Donat, Margaret Perry and Frank Virnelson (hereinafter referred to collectively as "private defendants"), and Wrightstown Township and Township Supervisors Harrison E. Dow, Aldanlee Spell, and N. Kline Fisher (hereinafter referred to collectively as "public defendants").

Defendants were alleged to have conspired to violate Section 1 of the Sherman Act, 15 U. S. C. § 1 (Count I) and Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the Fourteenth Amendment (Count II). The complaint charged that both the public and the private defendants engaged in a continuing combination and conspiracy in restraint of interstate trade and commerce which was designed to injure Miller in its business and property and to deprive Miller of rights guaranteed to it by the Constitution and laws of the United States. Jurisdiction of the United States District Court for the Eastern District of Pennsylvania was predicated upon Section 4 of the Clayton Act, 15 U. S. C. § 15, and Sections 1331 and 1343 of the Judicial Code, 28 U. S. C. §§ 1331, 1343.

Miller alleged that defendants' concerted activities began as early as September, 1974, when, at the instigation of an individual defendant Margaret Perry, who was a member of the defendant Association, defendants caused an investigation to be conducted into certain operating

practices of Miller on its 45-acre parcel. (Appendix, at A21; Complaint, ¶ 18). The investigation resulted in a finding by the public defendants that Miller was in violation of certain provisions of the Township zoning ordinance.[1] Miller was directed by the Board of Supervisors to cease certain quarrying activities.

In December, 1974, Miller filed a petition with the public defendants requesting that the Township zoning ordinance be amended to permit Miller to conduct mining and quarrying operations on its adjacent 12-acre plot. In July, 1975, Miller challenged the zoning ordinance and proposed a curative amendment. (Appendix, at A21; Complaint, ¶ 20). At hearings held by the Township Board of Supervisors which sat as an adjudicatory body, private defendants appeared in opposition to Miller's petition.[2] As this quasi-judicial proceeding continued from September, 1975 through March, 1977,[3] it became apparent that there was, in fact, an ulterior motive behind the private defendants' activities before the tribunal. (Appendix, at A22; Complaint ¶ 21). Under the guise of opposing Miller's challenge to the zoning, private defend-

1. Miller contested the alleged violations before the Township Zoning Hearing Board which dismissed two of the violations. (Appendix, at A21; Complaint, ¶ 19).

2. See Municipalities Planning Code of 1972, § 1004(1)(b), 53 P. S. § 11004(1)(b); *Board of Commissioners of McCandless Township v. Beho Development Company, Inc.*, 16 Pa. Commonwealth Ct. 448, 332 A. 2d 848, *allocatur denied* (Pa. 1975) ("A challenge pursuant to section 1004(1)(b), 53 P. S. § 11004(1)(b) . . . requires the governing body to act, in effect, as a quasi-judicial body and consider the legal merits of the challenge to the validity of the ordinance.").

3. The public defendants denied Miller's zoning petition in June, 1977. Defendants' actions were contrary to the recommendations of the Bucks County Planning Commission. The Commission recommended that Miller's quarrying operations be permitted to expand onto the adjacent 12-acre tract. Memoranda of Bucks County Planning Commission, dated January 28, 1975, and May 13, 1975.

ants were actually engaged in a conspiracy with public defendants to subvert the functions of the adjudicatory proceedings for the purpose of achieving a collateral and unlawful objective, the termination of Miller's business. At the direction of public defendants, Miller was ordered to negotiate with private defendants with respect to the terms and conditions upon which public defendants would agree to rezone the 12-acre tract. (Appendix at A22; Complaint, ¶ 21). During prolonged negotiations with private defendants, it became apparent that they were not primarily concerned with coming to an accommodation with Miller as to plaintiff's proposed curative amendment. Rather, private defendants, with the support of public defendants, were using the adjudicatory proceedings as a vehicle to terminate the Miller enterprise altogether. Private defendants demanded that Miller cease its operations and pay over to defendant Perry the sum of $50,000 for alleged "pain and suffering." (Appendix, at A22; Complaint, ¶ 21).

When faced with private defendants' demands, Miller resumed the hearings before the public defendants in an attempt to reach a solution in keeping with the statutory purpose of the proceedings. (Appendix, at A22; Complaint, ¶ 22). An agreement was thereafter reached among public defendants, the Township Solicitor, John H. Wood, Esquire ("Wood"), and Miller. The agreement contained no provisions whereby Miller would discontinue its operations. However, public defendants, later, in keeping with the object of the conspiracy, relinquished their authority by conditioning their approval of the agreement upon its acceptance by the private defendants. Obviously, the public defendants were aware that when they sent the agreement to the private defendants for their approval, it would be rejected by them, as it was, because there was

no provision bearing on the termination of the Miller enterprise. (Appendix, at A23; Complaint, ¶ 23).

Concurrently with the joint illegal activities which impaired any fair and impartial hearing that Miller might have been able to obtain on its zoning petition, defendants expanded their activities and mounted a challenge to Miller's mining permits themselves. After Miller had been issued mining permits by the Commonwealth of Pennsylvania, which permits were required in order to conduct its quarrying operations, public defendants, at the instance of private defendants, challenged the issuance of the permits in an appeal which they took before the Pennsylvania Environmental Hearing Board in December, 1975. (Appendix, at A23; Complaint, ¶¶ 28, 31(g)). Public defendants delegated the conduct of the litigation to the private defendants and their counsel. This, however, did not mean that their own role was insignificant, because it was the public defendants that provided the financial resources necessary to fund the lawsuit. (Appendix, at A24; Complaint, ¶ 31(b), (c)). Public defendants, on behalf of all the defendants, paid all legal costs, expert fees and expenses arising out of the appeal.[4]

Defendants' efforts to injure and destroy Miller in its business were in violation of the very concept of an independent forum in which the dispute could be resolved. In December, 1976, simultaneously with their joint activities before the Environmental Hearing Board, private defendants suddenly grew dissatisfied with the way in which Wood, the Township Solicitor, was conducting the Miller

4. Defendants' appeal was subsequently *dismissed* by the Environmental Hearing Board, and the issuance of the mining permits to Miller by the Department of Environmental Resources was sustained. *Wrightstown Township, Wrightstown Township Civic Association (Intervenor), et al. v. Commonwealth of Pennsylvania, Department of Environmental Resources, and Miller & Son Paving, Inc.*, EHB Docket No. 75-307-W, issued December 1, 1977. See (Appendix, at A23 to A24; Complaint, ¶¶ 28-29).

litigation. In a petition to the Board of Supervisors they demanded that Wood be replaced. At the instance of the private defendants, the public defendants in January, 1977, relieved Wood of his duties with respect to the Miller zoning litigation and appointed in his place Terry W. Clemons, Esquire, who was a member of the defendant Association. (Appendix, at A23; Complaint, ¶¶ 24-26).

It is on these allegations that the defendants moved in the District Court to dismiss Miller's complaint on the grounds that it failed to state a cause of action under Section 1 of the Sherman Act, 15 U. S. C. § 1, Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983 and the Fourteenth Amendment. The District Court dismissed Miller's antitrust count. (Appendix, at A9). The Court of Appeals affirmed the judgment of the District Court on the basis of the *Noerr-Pennington* doctrine [5] as

5. See *Eastern Railroad Presidents Conference v. Noerr Freight*, 365 U. S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U. S. 657 (1955). The doctrine enunciated in *Noerr* and *Pennington* immunizes certain activities before the legislative and executive branches bearing on the passage or enforcement of laws which would be otherwise violative of Section 1 of the Sherman Act. The doctrine does not offer shelter to a conspiracy between public officials and private parties, as is alleged by Miller, which involves the subversion and abuse of the adjudicatory process so as to bar petitioner from having meaningful access to an independent adjudicatory tribunal. *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508 (1972); *Whitworth v. Perkins*, 559 F. 2d 378 (5th Cir. 1977), vacated and remanded *sub nom. City of Impact v. Whitworth*, 435 U. S. 992 (1978), opinion reinstated and case remanded *per curiam sub nom. Whitworth v. Perkins*, 576 F. 2d 696 (5th Cir. 1978), *cert. denied*, No. 78-889, 47 U. S. L. W. 3544 (U. S., February 20, 1979); *Kurek v. Pleasure Driveway & Park District*, 557 F. 2d 580 (7th Cir. 1977), vacated and remanded, 435 U. S. 992 (1978), reinstated on remand, 583 F. 2d 378 (7th Cir. 1978), *cert. denied*, No. 78-807, 47 U. S. L. W. 3453 (U. S., January 8, 1979); *Duke & Company, Inc. v. Foerster*, 521 F. 2d 1277 (3d Cir. 1975); *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272 (D. C. Cir. 1972); *Sacramento*

well as upon the ground that there was no allegation that defendants acted with either a "commercial objective" or a "commercial purpose". (Appendix, at A6). The Court of Appeals also dismissed Miller's civil rights count. The ground for its dismissal was predicated on its view that Miller's 43-paragraph complaint failed to plead with any specificity facts that would demonstrate that the Township Board of Supervisors denied Miller's zoning request because they were impermissibly biased against the plaintiff. (Appendix, at A7).

5. (Cont'd.)
Coca-Cola Bottling Co. v. Chauffeurs Teamsters, and Helpers Local No. 150, 440 F. 2d 1096 (9th Cir. 1971), *cert. denied*, 404 U. S. 826 (1971); *Harman v. Valley National Bank of Arizona*, 339 F. 2d 564 (9th Cir. 1964).

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Court of Appeals, Which Shields From Liability Concerted Violations of the Antitrust Laws on the Ground That the Activities Did Not Possess a Purely "Commercial Purpose", Is in Conflict With Decision of This Court.

The decision of the Court of Appeals, which limits the reach of Section 1 of the Sherman Act to conduct in restraint of trade that has a "commercial purpose" or "commercial objective," engrafts onto that statute an entirely new and additional element of proof that is not required by either the statute or by decisions of this Court.[6]

Section 1 of the Sherman Act, 15 U. S. C. § 1, declares all conspiracies in restraint of trade to be unlawful. The Act, in part, reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* . . . is declared to be illegal, ..." (Emphasis added).

6. A leading antitrust commentator has summarized the four factors which must occur for a violation of Section 1 of the Sherman Act to exist (16 Von Kalinowski, *Antitrust Laws and Trade Regulations* § 4.01 (1969):

"(1) There must be at least two persons acting in concert.

* * *

(2) The restraint complained of must restrain trade or commerce.

* * *

(3) The trade or commerce must be trade or commerce among the several states, or with foreign nations.

* * *

(4) The restraint must be unreasonable."

The courts below did not find nor did defendants contend that Miller failed to charge in its complaint any of the above factors found necessary to coexist in order for a plaintiff to bring an antitrust action under Section 1 of the Sherman Act.

Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

> "*Any person* who shall be injured in his *business* or property by reason of *anything* forbidden in the antitrust laws may sue therefor. . . ." (Emphasis added).

Neither Section 1 of the Sherman Act nor Section 4 of the Clayton Act sets forth as a precondition for a plaintiff to bring its antitrust suit that it allege that defendants' conduct has *"a commercial objective"*. Section 4 of the Clayton Act contains little in the way of restrictive language. In fact, on June 11, 1979, the Court, in *Reiter v. Sonotone Corporation,* No. 78-690, 47 U. S. L. W. 4672 (U. S., June 11, 1979) rejected the assertion that as a predicate for instituting an antitrust suit there be alleged an injury of "a commercial or competitive nature." 47 U. S. L. W., at 4674-4675.

The gravamen of any antitrust action is concerted conduct by two or more persons which has a proscribed effect on trade. It is the *means* used by defendants to accomplish the restraint and inflict injury on the plaintiff upon which the Sherman Act focuses, not whether the illegal activities are motivated by *"commercial purpose"*. The Third Circuit's newly imposed standard ignored that which this Court mandated in *Radovich v. National Football League,* 359 U. S. 445 (1957). Therein the Court held that an antitrust plaintiff's (352 U. S. 453-454):

> ". . . [C]laim need *only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade.' Times-Picayune Publishing Co. v. United States,* 345 U. S. 594, 614 (1953), *and meet the requirement that petitioner has thereby suffered injury.* Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private

enforcement of the antitrust laws by an aggrieved party. *These laws protect the victims of the forbidden practices as well as the public. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948). Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act. *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558 (1951). *In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.*" (Emphasis added). (Footnotes omitted).

To restrict the coverage of Section 1 of the Sherman Act to illegal conduct characterized as having "a commercial purpose" or "a commercial objective" unwarrantedly limits the protections afforded by the Act, despite the fact that the plaintiff was injured in his business by reason of activity violative of Section 1 of the Sherman Act. The decision of the Court of Appeals fails to consider the economic injury to the plaintiff and ignores the effect on competition when the plaintiff is the victim of the activities complained of and its ability to compete is eroded. In *Mandeville Island Farm, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219 (1948), this Court stated (334 U. S. at 236):

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *American Tobacco Co. v. United States*, 328 U. S. 781. *The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.*" (Emphasis added).

The dubious assertion that there must exist *a commercial animus* behind defendants' activities is thus superfluous because under the Sherman Act defendants are deemed to intend the natural and probable consequences of their acts. A conspiracy which imposes unlawful restraints on the trade of others is actionable under the Act. "It is sufficient that a restraint of trade . . . results as a consequence of a defendant's conduct . . . ," however that conduct may be characterized. *United States v. Griffith*, 334 U. S. 100, 105 (1948). In this vein, this Court, in *United States v. Patten*, 226 U. S. 525 (1913), stated (226 U. S. at 543):

> "[C]onspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, *by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.*" (Emphasis added).

Even though the *motive* of the activities complained of be "noncommercial", the activities undertaken in carrying out an otherwise "laudable" goal suffice to invoke the protections of the antitrust laws. In *American Medical Association v. United States*, 130 F. 2d 233 (D. C. Cir. 1942), *aff'd*, 317 U. S. 519 (1943), the court of appeals stated (130 F. 3d at 249):

> "[I]t was no defense to a charge of conspiracy to dynamite a man's house that the house was a dis-

> reputable resort, a place where moonshine whisky was sold and where lewd women congregated for unlawful purposes. And the same rule applies in cases of conspiracy under the Sherman Act. *Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it was designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the Sherman Act.*" (Emphasis added). (Footnote omitted).

See also, *Council of Defense v. International Magazine Co.*, 267 F. 390, 411-412 (8th Cir. 1920); *Tondas v. Amateur Hockey Association of the United States*, 438 F. Supp. 310, 313 (W. D. N. Y. 1977).

Petitioner Miller has charged that public defendants and private defendants have conspired to terminate plaintiff's business operations. The public defendants participated in the conspiracy with private defendants in the adjudicatory proceedings before the Township Board of Supervisors which Miller had brought challenging the validity of the township zoning ordinance as it affected petitioner's 45-acre and 12-acre tracts of land. In these proceedings the Board of Supervisors acts as a quasi-judicial body in considering a zoning challenge. The purpose of the proceedings was a narrow one, and related solely to whether Miller had cause to justify a change in zoning of its 12-acre tract. Respondents utilized these adjudicatory hearings as a vehicle to secure the termination of Miller's business and the exaction of a monetary payment from the plaintiff. In the proceedings before the Pennsylvania Environmental Hearing Board, which Miller alleged were instigated by respondents with the object of *completely* terminating Miller's operations by attacking

petitioner's mining permits, the respondents again acted in concert. In fact, the public defendants financially funded the private defendants' challenge to Miller's mining permits. Private defendants' baseless legal objections both before the Board of Supervisors and Environmental Hearing Board were, petitioner alleged, only a *sham* and a pretext for respondents to achieve their collateral and unlawful objective, which was the elimination of the Miller enterprise as a commercial entity. The extent of the collusion between the public and private defendants in the judicial proceedings involving Miller is evidenced by the replacement of Wood, as the Township's attorney charged with prosecuting the Miller litigation, by Clemons, a member of defendant civic association.[7]

The objective of defendants' conspiracy was, plaintiff alleged, to preclude any expansion by Miller of its business, thereby injuring the plaintiff by both limiting and weakening its competitive position, and by causing plaintiff to lose business and eventually to cease operations altogether. Defendants, in instigating litigation before the Environmental Hearing Board, sought to accomplish their

7. In *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272 (D. C. Cir. 1972), an antitrust case factually similar to Miller's case, the court of appeals held the *Noerr-Pennington* doctrine to be *inapplicable*. Defendants, among whom was included an official of the Federal Food and Drug Administration ("FDA"), were charged by plaintiffs with violations of the antitrust laws arising out of a conspiracy to deny the plaintiffs a fair hearing on their application for approval of a new drug before the FDA. Defendants were alleged to have committed acts which included:

> "Suppressing, concealing and misconstruing information[,] . . . arranging for the employment as a consultant to the FDA of a medical doctor who had a financial interest in [the defendants' business,] . . . and . . . misrepresenting the safety and efficacy of [the plaintiffs' new drug]."

The court of appeals held that defendants' joint activities before the FDA had an ulterior purpose which was to preclude a fair and impartial hearing of plaintiffs' application by that administrative body. 466 F. 2d at 279.

objective in a more immediate fashion by directly challenging Miller's mining permits, permits which petitioner was required by the Commonwealth of Pennsylvania to maintain in order to operate its business at all.

Defendants did not attempt to *induce* action by legislative and executive bodies, conduct which would have been protected under the *Noerr-Pennington* doctrine. Instead, they actually sought to and did preclude objective action by an independent judicial and adjudicatory body. They were not seeking to influence a *legislative* body in its policy-making function; rather they were attempting to undermine an *adjudicatory process* and to deprive plaintiff of any meaningful access to the *adjudicatory body.* See *California Motor Transport Co. v. Trucking Unlimited,* 404 U. S. 508 (1972); *Whitworth v. Perkins,* 559 F. 2d 37 (5th Cir. 1977), vacated and remanded *sub nom. City of Impact v. Whitworth,* 435 U. S. 992 (1978), opinion reinstated and case remanded *per curiam sub nom. Whitworth v. Perkins,* 576 F. 2d 696 (5th Cir. 1978), *cert. denied,* No. 78-889, 47 U. S. L. W. 3544 (February 20, 1979); *Israel v. Baxter Laboratories, Inc.,* 466 F. 2d 272 (D. C. Cir. 1972); *Mason City Center Associates v. City of Mason City,* 1979-1 Trade Cases ¶ 62, 628 (N.D. Iowa 1979); *Nelson v. Utah County,* 1978-1 Trade Cases ¶ 62, 128 (D. Utah 1977); See also, Fischel, "Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine", 45 *U. Chi. L. Rev.* 80, 106-110 (1977); Note, "Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process", 86 *Harv. L. Rev.* 715 (1973).

This Court has unvaryingly construed the Sherman Act to insure that it sweeps within its scope *all* forms of concerted illegal activities. As early as 1911, the Court, in *United States v. American Tobacco Co.,* 221 U. S. 106, expressed the intention to apply the Sherman Act to every person or entity that agrees to conspire to restrain trade. The motive, objective, and purpose of the proscribed activity, whether characterized as either "commercial" or "noncommercial", are irrelevancies. The Court stated (221 U. S. at 181):

> "[T]he generic designation of the 1st and 2d sections of the law [Sherman Act], when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, *without regard to the garb in which such acts were clothed. That is to say, it was held that, in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute.*" (Emphasis added)

The ruling of the Court of Appeals which limits the reach of Section 1 of the Sherman Act, is contrary to the intendment of this Court and of Congress that the antitrust laws prohibit *all* conduct in restraint of trade.

II. The Decision of the Third Circuit Engrafts Onto the Notice Pleading Requirements of the Federal Rules of Civil Procedure an Entirely New Concept of "Fact-Pleading" Which Ignores and Is at Odds With the Decisions of This Court and the Courts of Appeals.

The decision of the Court of Appeals, which requires that a civil rights count in a complaint must be specifically

pleaded in order to avoid a motion to dismiss, is an aberration and is *directly at odds* with the decision of this Court in *Conley v. Gibson*, 355 U. S. 41, 47-48 (1957), and the provisions of Rule 8 of the Federal Rules of Civil Procedure. In *Conley v. Gibson*, a case which involved the vindication of plaintiffs' civil rights, the Court expressly adopted the notice pleading standard contained in Rule 8(a)(2) (355 U. S. at 47-48):

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. *The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.* The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice', we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. *The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.*" (Emphasis added). (Footnote omitted).[8]

See also, *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974); *Haines v. Kerner*, 404 U. S. 519, 520-521 (1972).

Contrary to this Court's decision in *Conley v. Gibson*, the Court of Appeals has held that petitioner's (Appendix, at A7):

> "[C]omplaint failed to allege with *specificity facts* supporting an allegation that the Supervisors denied its request for rezoning because they were impermissibly biased against Miller & Son. See *Rotolo v. Borough of Charleroi*, 532 F. 2d 920 (3d Cir. 1976) ('*In this circuit*, plaintiffs in civil rights cases are required to *plead facts with specificity*')." (Footnote omitted). (Emphasis added).

There is no authority for the exacting special "fact-pleading" rule adopted by the Court of Appeals. A leading federal commentator has stated (5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1230, at 174-175 (1969)):

> "In any case, the court should remember that fundamental rights and important questions of public policy are involved in actions under the various civil rights statutes and should not dismiss the complaint unless it clearly is frivolous or fails to state a claim for relief. *In all respects the normal federal rule pleading standards apply to civil rights actions.*" (Emphasis added). (Footnote omitted).

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8. Rule 8(e)(1) provides that:
"Each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required."

A "fact-pleading" requirement which singles out civil rights plaintiffs for extraordinary treatment is at variance with the standards approved by Congress in Rule 8 of the Federal Rules of Civil Procedure.

The Court of Appeals for the Second Circuit, in *Holmes v. New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968), has stated the accepted rule which governs the review of civil rights complaints:

> "The mere fact that some of the allegations in the complaint are lacking in detail is not a proper ground for dismissal of the action. *Harman v. Valley National Bank of Arizona*, 339 F. 2d 564 (9 Cir. 1964); 2A Moore's Federal Practice ¶ 12.08, at 2245-2246 (2d. ed. 1968). *A case brought under the Civil Rights Act should not be dismissed at the pleadings stage unless it appears 'to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.' Barnes v. Merritt*, 376 F. 2d 8, 11 (5 Cir. 1967)." (Emphasis added).

See also, *Lessman v. McCormick*, 591 F. 2d 605, 611 (10th Cir. 1979) ("In many cases of conspiracy essential information can only be produced through discovery, and the parties should not be thrown out of court before being given an opportunity through that process to ascertain whether the linkage they think may exist actually does."); *Nickens v. White*, 536 F. 2d 802, 803 (8th Cir. 1976); *Littleton v. Berbling*, 468 F. 2d 389 (7th Cir. 1972), *rev'd sub nom. O'Shea v. Littleton*, 414 U. S. 488 (1974), on basis of failure to allege actual case or controversy; *Azar v. Conley*, 456 F. 2d 1382 (6th Cir. 1972).

There is no authority in any decision of this Court nor any rational reason for the Court of Appeals to have

held, as it did hold, that a complaint that identifies the defendants that acted and details the time, place, nature, and manner of their actions is insufficient. Plaintiff's complaint alleged that the illegal conspiracy of public and private defendants prevented it from obtaining the impartial and detached adjudicatory proceeding guaranteed to it by the Due Process Clause of the Fourteenth Amendment. See *Withrow v. Larkin*, 421 U. S. 35, 47 (1974); *Ward v. Village of Monroeville*, 409 U. S. 57, 61-62 (1972); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 161 (1951); *Tumey v. Ohio*, 273 U. S. 510 (1927); *Fitzgerald v. Hampton*, 467 F.2d 755, 764, 766-767 (D. C. Cir. 1972); *Stephens v. City of Plano, Texas*, 375 F. Supp. 985, 988 (E.D. Tex. 1974).

In paragraphs 1 through 9, and 12 through 34 of the Complaint, plaintiff detailed and specified the acts upon which its civil rights count in paragraph 40 was grounded. (Appendix, at A18 to A19, A20 to A26, A27). Plaintiff alleged that defendants' concerted illegal activities were designed to subvert the integrity of the Board of Supervisors, to bar Miller from having access to an adjudicatory body possessing the ability to function independently and render an impartial judgment, and finally to bring about the termination of Miller's business. Defendants' opposition to Miller's zoning challenge, plaintiff alleged, was a mere subterfuge and served as a vehicle by which defendants could obtain their ultimate objective, the elimination of Miller's business. Defendants' concerted challenge to Miller's mining permits before the Pennsylvania Environmental Hearing Board sought the immediate cessation of its operations. Defendants' attack was synchronized to coincide with their illegal activities before the Board of Supervisors. The public defendants' replacement of Wood by Clemons, himself a member of the defendant Associa-

tion, as the Township attorney designated to prosecute the Miller litigation on behalf of public defendants, was further evidence, plaintiff alleged, of defendants' conspiracy.

It is apparent that defendants' conspiracy had two goals. *First,* in the adjudicatory proceedings before the Board of Supervisors, their joint efforts were directed at preventing any further development of the Miller enterprise with the goal of eliminating the Miller business altogether. *Second,* defendants' activities before the Environmental Hearing Board were designed to secure the *immediate* revocation of Miller's mining permits. In that proceeding, Miller's right to exist as a viable business entity was directly at issue, because the mining permits which the Commonwealth had issued Miller, and which were necessary for its operation, were directly challenged by defendants.

Paragraph 31 of the Complaint specifically informed the respondents that as a result of their joint conduct (Appendix, at A25):

> "(d) Defendants *usurped* the Board of Supervisors' responsibility for determination of Miller's petitions for change of the zoning classifications of the 12-acre plot and other related matters.
>
> (e) Defendants prevented the Board of Supervisors from *functioning as an independent body.*
>
> (f) Defendants *prolonged* Miller's proceedings before the Board of Supervisors, and made it difficult and expensive for Miller to pursue its rights.
>
> (g) The Board of Supervisors permitted unjustified intervention in the proceedings by the other defendants, with knowledge that their purpose was *collateral and unrelated to the rezoning proceedings,* namely, to injure Miller in its business and property." (Emphasis added).

It was upon these allegations that the Court of Appeals erroneously ruled that petitioner's complaint lacked the required specificity of facts and affirmed the dismissal of the complaint by the District Court.

III. Conclusion.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1299

MILLER & SON PAVING, INC.,
Appellant

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION; GEORGE DONAT; MARGARET PERRY; FRANK VIRNELSON; HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania; and WRIGHTSTOWN TOWNSHIP

(D. C. Civil Action No. 77-2698)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of

Pennsylvania and was argued by counsel on March 22, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed January 13, 1978, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

April 2, 1979

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1299

MILLER & SON PAVING, INC.,
Appellant

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION; GEORGE DONAT; MARGARET PERRY; FRANK VIRNELSON; HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania; and WRIGHTSTOWN TOWNSHIP

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Civ. No. 77-2698)

Argued March 22, 1979

Before SEITZ, *Chief Judge*, and ALDISERT and ROSENN, *Circuit Judges*

(Filed April 2, 1979)

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Opinion of the Court.

PER CURIAM.

Plaintiff appeals from an order of the district court dismissing its complaint under Rule 12(b)(6), F. R. Civ. P. *See Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268 (E. D. Pa. 1978).

The plaintiff is engaged in the business of stone quarrying in Wrightstown Township, Pennsylvania. The defendants are the Township, three of its Supervisors, the Wrightstown Township Civic Association (a private body) and three of its members.

Miller & Son's complaint alleged that the defendants had conspired to violate section 1 of the Sherman Act, 15 U. S. C. § 1 (Count I) and sections 1, 2 and 6 of the Civil Rights Act of 1871, 42 U. S. C. §§ 1983, 1985 (3) & 1986, and the fourteenth amendment (Count II). Plaintiff sought injunctive relief and damages arising from this conspiracy. The district court dismissed both counts of plaintiff's complaint.

Plaintiff's claims were based on the following actions alleged to have been taken by the defendants with respect to Miller & Son's business enterprise: the entry of a cease and desist order by the Township Supervisors in response to a complaint from the Civic Association that plaintiff had violated the Township's zoning ordinance in the operation of its quarry; the denial by the Supervisors of plaintiff's request, which was opposed by the Civic Association, for the rezoning of an additional tract of land owned by plaintiff to permit the conduct of quarrying thereon; and the filing of an administrative appeal by the Supervisors, allegedly on behalf of the Civic Association, from an order of the Pennsylvania Department of Environmental Re-

sources, granting plaintiff a surface mining permit and mine drainage permit.

We agree with the district court's conclusion that the *Noerr-Pennington* doctrine barred the imposition of antitrust liability on the defendants for the activities alleged by plaintiff to have transpired. *See United Mine Workers v. Pennington*, 381 U. S. 657 (1965); *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). Although this Court has held in *Duke & Company Inc. v. Foerster*, 521 F. 2d 1277, 1282 (3d Cir. 1975), that the *Noerr-Pennington* doctrine is inapplicable to an action claiming "official participation with private individuals in a scheme to restrain trade," the allegations of Miller & Son's complaint are insufficient to bring this case within that language. Significantly, there is no allegation that either the public or private defendants acted in this case with a commercial purpose to restrain plaintiff's trade in stone and stone products. Absent any allegation of a commercial objective on the defendants' part, the district court did not err in dismissing the Sherman Act count. *Cf. Missouri v. National Organization for Women, Inc.*, — F. Supp. —, —, 47 U. S. L. W. 2545, 2546 (W. D. Mo. 1979) (Sherman Act does not apply to NOW's convention boycott campaign against states that have failed to ratify the Equal Rights Amendment because that boycott was not instigated by commercial competitors nor designed to serve marketplace goals).

We also agree with the district court's dismissal of plaintiff's civil rights count. Miller & Son does not challenge on appeal the district court's holding that its failure to allege class-based discrimination was fatal to any claim under 42 U. S. C. §§ 1985(3) & 1986. The plaintiff does argue, however, that the district court misconstrued its § 1983 claim, and contends that a valid due process claim,

actionable under that statutory provision, was set forth in its complaint. Plaintiff contends that the second count of its complaint alleged a conspiracy of the public and private defendants to prevent the plaintiff from obtaining a neutral and detached adjudication of its application for rezoning. Plaintiff argues that such an allegation brings this case within the well-recognized principle of due process that "a biased decisionmaker [is] constitutionally unacceptable." *Withrow v. Larkin*, 421 U. S. 35, 47 (1975).

On appeal, Miller & Son relies on its original complaint as sufficiently averring facts in support of such a due process claim based on the Supervisors' impermissible bias. However, in reviewing plaintiff's complaint and the arguments made before the district court on defendants' motion to dismiss, we do not find such a claim to have been focused upon by the plaintiff as the basis for its demand for relief under § 1983. Moreover, plaintiff's complaint failed to allege with specificity facts supporting an allegation that the Supervisors denied its request for rezoning because they were impermissibly biased against Miller & Son. *See Rotolo v. Borough of Charleroi*, 532 F. 2d 920, 922 (3d Cir. 1976) ("In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity.").[1]

1. As an alternative ground supporting its dimissal of the § 1983 claim against the Township itself, the district court relied on the holding in *Monroe v. Pape*, 365 U. S. 167 (1961), that municipalities are not "persons" within the meaning of § 1983. Subsequent to the district court's order the Supreme Court reversed that aspect of *Monroe* in *Monell v. Department of Social Services of City of New York*, 436 U. S. 658 (1978). Our disposition of this appeal, of course, does not require us to consider the Township's amenability to suit under § 1983.

Nor need we express any view on the defendants' contention that the individual Supervisors of Wrightstown Township are absolutely immune from liability for damages arising from their "legislative" acts. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, — U. S. — , — & n. 26, 47 U. S. L. W.

The order of the district court granting defendants' motion to dismiss the complaint will be affirmed.

1. (Cont'd.)
4256, 4260 & n. 26 (March 5, 1979) (reserving the question whether individuals performing legislative functions at the local level, as opposed to the regional level, should be afforded absolute immunity from federal damage claims).

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2698

MILLER & SON PAVING, INC.

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, et al.

Order.

AND NOW, this 11th day of JANUARY, 1978, it is hereby

ORDERED that the defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted be and the same is hereby GRANTED.

By THE COURT:

JOSEPH L. McGLYNN, JR.
Joseph L. McGlynn, Jr., *J.*

APPENDIX D.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2698

MILLER & SON PAVING, INC.

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, et al.

Memorandum of Decision.

McGLYNN, *J.*

The plaintiff in this case, Miller & Son Paving, Inc. (Miller), is engaged in the business of stone quarrying in Wrightstown Township, Pennsylvania. Miller brought this suit against Wrightstown Township Civic Association and certain individual residents of the Township. Miller charges that all defendants engaged in a concerted effort to terminate the operation of Miller's business in violation of section 1 of the Sherman Antitrust Act, 15 U. S. C. § 1 (count I), and sections 1, 2, and 6 of the Civil Rights Act of 1871, 42 U. S. C. §§ 1983, 1985(3) and 1986 (count II). Presently before the court are motions by all defendants to dismiss the complaint for failure to state a claim upon which relief may be granted.

For the purpose of these motions, I accept all allegations of the complaint as true. *Kurek v. Pleasure Driveway & Park District*, 557 F. 2d 580, 584 (7th Cir. 1977). A summary of those allegations follows.

Miller has owned and quarried a 45 acre tract of land in Wrightstown Township since 1959. This land has been and is presently zoned Q-A Quarry-Agriculture. In 1973, Miller purchased 12 acres of land adjoining the original 45 acre plot. This land is presently and was at the time of purchase zoned R-2 Residential Agriculture.

In September, 1974, the Township Supervisors, at the initiation of defendant Perry, whose residence borders on Miller's quarry operation, "issued an order directing Miller to cease and desist certain activities in connection with quarrying within the 45 acre plot." That order was appealed to the Township's Zoning Hearing Board where the order of the Supervisors was upheld in part and dismissed in part. Both Miller and the Township appealed the order of the Hearing Board and that appeal is presently pending before the Court of Common Pleas of Bucks County, Pennsylvania.

In December, 1974, Miller filed a petition with the Supervisors to change the zoning classification of the 12 acre plot from R-2 Residential-Agriculture to Q-A Quarry-Agriculture. In the course of hearings that were held on Miller's petition, the Supervisors directed Miller to negotiate with the other defendants and stated that they would rezone only on conditions acceptable to the civic association and the other individual defendants. The negotiations proved fruitless and in June of 1977, the supervisors issued an order denying Miller's petition for rezoning.

In addition to these activities regarding zoning regulations, Miller charges that the defendants combined for the purpose of terminating his business, by filing an appeal with the Pennsylvania Environmental Hearing Board from the grant to Miller by the Department of Environmental Resources of a surface mining permit and mine drainage permit. The complaint states that although the Supervi-

sors initiated the appeal and the Township paid all the expenses, "the Supervisors delegated to the Association and to the other defendants the conduct of the appeal."

As a result of the activities of the defendants, Miller alleges that he has been unable to quarry in the 12 acre tract and "has been prevented from selling stone and stone products in Pennsylvania and New Jersey." Thus, Miller claims that the flow of stone products and stone in Interstate Commerce has been restrained and that competition between Miller and other quarry operators has been suppressed.

Because I find that the activities alleged in the complaint are not of the type that the Sherman Act or the Civil Rights Act of 1871 were designed to prohibit, I will dismiss the complaint for failure to state a claim upon which relief can be granted.

Antitrust Claim

Although the language of the Sherman Act is very broad, it has long been settled that Congress intended its proscriptions to be limited to "commercial transactions". *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 492-93 (1940). The political nature of the defendant's activities in this case is, therefore, fatal to the plaintiff's antitrust claim.

In this regard, I find instructive the case of *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc.,* 432 F. 2d 650 (D. C. Cir.) *cert. denied* 400 U. S. 965 (1970). The plaintiff in that case was refused consideration for accreditation by the defendant because the college was operated on a for profit basis. The court dismissed the complaint finding that the non-commercial nature of the defendant's activities made the Sherman Act inapplicable. The plaintiff had urged that since the plaintiff was engaged in "trade",

any restraint on that "trade" was actionable under the Sherman Act. The court disagreed and stated that "the proscriptions of the Sherman Act were 'tailored . . . for the business world' not for the non-commercial aspects of the liberal arts and the learned professions." Id. at 654 *quoting Eastern R. R. Presidents Conference v. Noerr Motor Freights, Inc.,* 365 U. S. 127, 141 (1961). *See also Donnely v. Boston College,* 558 F. 2d 634 (1st Cir. 1977).

In the present case, there is no allegation that there is any commercial aspect to the defendant's actions. The plaintiff claims, however, that the effect of the defendant's activities is to reduce the viability of the plaintiff as a competitor in the interstate market for stone and stone products. This argument is essentially the same as the one rejected by the court in *Marjorie Webster.* The plaintiff claims that it is engaged in "trade" and therefore any damage to the plaintiff's business is a restraint on trade. I cannot accept this reasoning, however, because it overlooks the fact that the conduct alleged is simply not the kind that the Sherman Act was designed to regulate. As the Supreme Court stated in *Noerr,* the activities of the defendants here

> bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another take away the trade freedom of others through the use of such devices as price fixing agreements, boycotts, market-division agreements and other similar arrangements.

365 U. S. at 136

In *Noerr,* the Sherman Act was held not to apply to attempts to influence the enforcement or passage of laws

even where "the sole purpose in seeking to influence the passage and enforcement of laws was to destroy . . . competitors". *Id.* at 138. The present case is an even stronger one for not applying the antitrust laws since the defendants have no direct interest in eliminating competition in the quarrying business. Thus, no anticompetitive purpose can be attributed to the defendants.

The plaintiff argues that the Sherman Act becomes applicable to political activity when it is alleged that government is a part of the conspiracy, and cites *Whitworth v. Perkins*, 559 F. 2d 378 (5th Cir. 1977); *Kurek v. Pleasure Driveway and Park District*, 557 F. 2d 580 (7th Cir. 1977); *Duke & Co. v. Foerster*, 521 F. 2d 1277 (3rd Cir. 1975). The fact that a conspiracy is alleged, however, does not change the essential non-commercial character of the activities alleged by the defendant. The cases cited by the plaintiff are inapplicable because they deal with government activities in the business rather than the political arena. "The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Noerr, supra* at 141. Consequently, I conclude that the plaintiff's complaint does not state a cause of action under the antitrust laws.

The Civil Rights Claim

Count II of plaintiff's complaint alleges that the activities of the defendants in this zoning dispute amount to a violation of Miller's constitutional rights cognizable under the Civil Rights Act of 1871 and directly under the fourteenth amendment. I disagree and, therefore, dismiss Count II for failure to state a claim upon which relief can be granted.

Although the complaint only states in broad, conclusory language that Miller had been deprived "rights, privileges and immunities under law," the gravamen of the

§ 1983 claim is apparently that plaintiff has a property interest in its quarry operation and that the defendants have deprived Miller of the full use of that property. Because the property interest is protected by the fourteenth amendment, the plaintiff asserts that the complaint states a cause of action under § 1983. The fallacy of this argument is that not every deprivation of property is a constitutional violation. Only when an individual has been deprived of property without due process of law has he been injured in a constitutional sense. U. S. Const. Amend. XIV. The complaint does not specify what due process rights Miller has been denied or even that there was a denial of due process. The complaint is, therefore, defective since Civil Rights actions in this circuit must be pled with specificity. *Rotolo v. City of Charlerois* [sic], 532 F. 2d 920 (3rd Cir. 1976).

Even if I were to overlook the failure of the complaint to specifically articulate the constitutional deprivations for which redress is sought, it is apparent that no cause of action is stated by the facts alleged. The facts alleged are that the Township Supervisors issued a cease and desist order for alleged violations of the township zoning ordinance, that they denied the plaintiff's application for rezoning, that they appealed the granting of necessary permits to the plaintiff by the Pennsylvania Department of Environmental Resources, and that all of these actions were taken pursuant to a "conspiracy" between all of the defendants. The "conspiracy" apparently consisted of an agreement on the desirability of taking the actions outlined above. I fail to see how such an agreement can be construed as a violation of anyone's constitutional rights.

The factual allegations reveal that what is involved in this case amounts to nothing more than a local zoning dispute. A federal district court may not "sit as a super zoning board with power to act *de novo*, but rather has,

in the absence of alleged racial or economic discrimination, a limited role of review." *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F. 2d 956, 960 (1st Cir. 1972) (footnote omitted). The only question I am empowered to review is "whether the action of the zoning commission [supervisors] is arbitrary and capricious, having no substantial relation to the general welfare." *South Gwinnett Venture v. Pruitt,* 491 F. 2d 5 7 (5th Cir.) *cert. denied* 419 U. S. 837 (1974). The complaint is devoid of any allegation of arbitrariness. Consequently, I am without the power to review the decisions of the supervisors. In any event, the fact that the plaintiff has had numerous hearings before the supervisors and the Township's Zoning Hearing Board and has appeals pending before the Common Pleas Court of Bucks County shows that he has been afforded ample procedural due process.

As to the plaintiff's assertion of a cause of action under 42 U. S. C. §§ 1985(3) & 1986, I find the lack of any allegation of class based discrimination fatal to that claim. *Griffin v. Breckenridge,* 403 U. S. 88 (1971); *Waits v. McGowan,* 516 F. 2d 203, 208 (3rd Cir. 1975).

In addition to the reasons stated above, the claim against Wrightstown Township based on the Civil Rights Act of 1871 must be dismissed because the Township is not a person within the meaning of the Act. *City of Kenosha v. Bruno,* 412 U. S. 507 (1973); *Monroe v. Pape,* 365 U. S. 167 (1961). Because I find that nothing alleged in the complaint amounts to a violation of the plaintiff's constitutional rights, I need not decide if a cause of action exists against the Township directly under the fourteenth amendment. *Compare Drennon v. Philadelphia General Hospital,* 428 F. Supp. 809 (E. D. Pa. 1977) (Higginbotham, J.) *with Jones v. McElroy,* 429 F. Supp. 848 (E. D. Pa. 1977) (Luongo, J.).

I, likewise, express no opinion on whether or not the Supervisors are protected by absolute immunity. *See Tenney v. Brandhove,* 341 U. S. 366 (1951); *Jonet v. Bodick,* 431 Pa. 58, 244 A. 2d 751 (1968).

Conclusion

In dismissing this complaint, I am aware that dismissal under Rule 12(b)(6) should only be ordered when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U. S. 41, 45-46 (1957). Nevertheless, I am convinced that justice is best served by a dismissal in this case because of the "danger that the mere pendency of the action will chill the exercise of First Amendment rights . . ." *Franchise Realty v. San Francisco Local Joint Executive Board,* 542 F. 2d 1076, 1083 (9th Cir. 1976). The allegations of the complaint amount to no more than a charge that certain citizens of Wrightstown Township petitioned the Township Supervisors to enforce the local zoning laws against the plaintiff and the supervisors did so. The result has been that the Township and the plaintiff have become involved in two separate state court actions which are still pending. I see no reason to add leverage to Miller's position in the state court by continuing to entertain a groundless federal claim.

APPENDIX E.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2698

JURY TRIAL DEMANDED

MILLER & SON PAVING, INC.

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION,

GEORGE DONAT,

MARGARET PERRY,

FRANK VIRNELSON,

HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania,

and

WRIGHTSTOWN TOWNSHIP

Complaint.

COUNT I: VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT.

1. Plaintiff MILLER & SON PAVING, INC. (hereinafter referred to as "Miller"), is a corporation organized and existing under the laws of Pennsylvania and is engaged in the extracting or mining of stone and other quarrying activities in Wrightstown Township, Bucks County, Pennsylvania (hereinafter referred to as "the Township").

2. Defendant WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION (hereinafter referred to as "the Association") is a nonprofit association organized and existing under the laws of the Commonwealth of Pennsylvania.

3. Defendant GEORGE DONAT is an individual residing in the Township and was, at all relevant times, President of the Association.

4. Defendant MARGARET PERRY is an individual residing in the Township.

5. Defendant FRANK VIRNELSON is an individual residing in the Township.

6. Defendant HARRISON E. DOW was, at all times relevant herein, a member of the Board of Supervisors of the Township, and is sued as an individual and as such member.

7. Defendant ALDANLEE SPELL was, at all times relevant herein, a member of the Board of Supervisors of the Township, and is sued as an individual and as such member.

8. Defendant N. KLINE FISHER was, at all time relevant herein, a member of the Board of Supervisors of the Township, and is sued as an individual and as such member.

9. Defendant WRIGHTSTOWN TOWNSHIP is a Township of the Second Class, created pursuant to The Second Class Township Code of Pennsylvania as amended (15 P. S. § 65101 *et seq.*).

10. This Count is brought under Sections 4 and 6 of the Clayton Act to obtain injunctive relief and to recover treble damages and the costs of suit, including reasonable attorneys' fees, from defendants for the injuries sustained by plaintiff in its business and property by reason of defendants' violations, as hereinafter alleged, of Section 1 of the Sherman Act.

11. All of the defendants are found within or transact business within this Judicial District.

12. At some of the times relevant herein, John H. Wood, Jr., Esquire (hereinafter referred to as "Wood") was the Township Solicitor, and Terry W. Clemons, Esquire (hereinafter referred to as "Clemons") was the Assistant Township Solicitor.

13. Miller is engaged in interstate trade and commerce in the sale and purchase of quarried stone and stone products in Pennsylvania and New Jersey, and the illegal acts hereinafter alleged have unreasonably restrained such interstate trade and commerce. Miller sells and delivers substantial amounts of quarried stone in New Jersey, and it buys substantial amounts of goods throughout the United States, including New Jersey, Ohio, Iowa and California.

14. Miller owns approximately 45.459 acres of land ("the 45-acre plot") which is zoned QA-Quarry-Agriculture under the terms of the Zoning Ordinance of the Township. Miller has owned and quarried the 45-acre plot since 1959.

15. In or about January, 1973, Miller purchased 12.853 acres of land ("the 12-acre plot"), zoned R-2 Residential-Agriculture under the terms of the Zoning Ordinance of the Township, which abuts the 45-acre plot.

16. Miller has invested more than $3 million dollars in its business, employs approximately 120 persons, and has annual sales in excess of $3.5 million.

17. Defendant Margaret Perry (hereinafter referred to as "Perry") owns land which abuts the 45-acre plot, and her residence is approximately 1200 to 1400 feet from Miller's property line, and is separated from the 12-acre plot by the 45-acre plot.

18. On or about September 26, 1974, defendants Harrison E. Dow, Aldanlee Spell and N. Kline Fisher (hereinafter referred to collectively as "the Supervisors"), acting on behalf of the Township, upon the initiation of, and in cooperation with, defendant Perry, issued an order directing Miller to cease and desist certain activities in connection with quarrying within the 45-acre plot. Miller appealed from that order to the Zoning Hearing Board of the Township.

19. Several hearings were held before the Zoning Hearing Board of the Township, and on December 28, 1976, the Zoning Hearing Board dismissed two violations claimed by Perry, but affirmed other alleged violations. Both Miller and the Township filed appeals from the action of the Zoning Hearing Board to the Court of Common Pleas of Bucks County, Pennsylvania, which appeals are presently pending.

20. On or about December 23, 1974, Miller filed a petition with the Supervisors to amend the Zoning Ordinance of the Township and to amend the Zoning Map of the Township by changing the zoning classification of the 12-acre plot from a R-2 Residential-Agriculture to QA-Quarry-Agriculture. On or about July 19, 1975, Miller filed a supplemental petition with the Supervisors for a

curative amendment to rezone the 12-acre plot to QA-Quarry-Agriculture.

21. Hearings were held on September 9, 1975, October 2, 1975, October 29, 1975, May 4, 1976, November 29, 1976, January 10, 1977, February 23, 1977, and March 24, 1977, on Miller's petition to rezone the 12-acre plot and Miller's supplemental petition for a curative amendment. During the pendency of the proceedings, the Supervisors suspended the hearings and directed Miller to negotiate with the other defendants, stating they would rezone the 12-acre tract only on terms and conditions satisfactory to the Association and other defendants. Thereafter, Miller attempted, over a period of months, to negotiate a basis of agreement for rezoning of the 12-acre tract with the Association and the other defendants. Miller was confronted with defendants' demands, among other things that (a) Miller cease its operations within a time substantially shorter than the normal life of its quarry and, in addition, (b) that Miller pay to Perry the sum of $50,000 for her alleged "pain and suffering."

22. Faced with the foregoing unjustifiable demands by the Association and the other defendants, Miller sought again to have the Supervisors perform their duties, in a fashion independent of the Association and other defendants, in determining Miller's petition to rezone or to grant the curative amendment. Thereafter, representatives of Miller met with the Supervisors and Wood on several occasions. A mutually acceptable basis was reached for the rezoning of the 12-acre plot to QA-Quarry-Agriculture. Accordingly, Miller's representatives drafted an Agreement embodying the terms which Miller had been advised would be acceptable to the Supervisors. Wood was directed by the Supervisors to secure the approval of the Association to the terms of such Agreement.

23. Because of objections by the defendants, the Supervisors refused to enact that which they had agreed to effectuate. The Supervisors, again, in effect, delegated their responsibility to the Association and other defendants, breached their agreement, and refused to decide Miller's petition for a change of the zoning classification under applicable legal principles.

24. In December, 1976, the Association filed a petition with the Supervisors, which, in part, criticized Wood's handling of the litigation with Miller and demanded that Wood be replaced by other counsel.

25. Miller sought to examine the aforementioned petition submitted by the Association to the Township Supervisors, but Miller was denied the right by the Supervisors to inspect the petition, and the Supervisors have withheld the petition from the public records.

26. On January 3, 1977, at their meeting, the Supervisors, at the instance of the other defendants, granted the prayer of defendants' petition and relieved Wood of his duties as Township Solicitor with respect to the Miller litigation, and appointed Clemons, a member of the Association, to that post and assigned to him the handling of the litigation with Miller.

27. On June 22, 1977 the Supervisors issued an order denying Miller the requested rezoning for the 12-acre tract.

28. On or about December 8, 1975, the Supervisors, at the instance and demand of the Association, caused an appeal to be filed with the Pennsylvania Environmental Hearing Board from the grant to Miller by the Department of Environmental Resources of Surface Mining Permit No. 799-75 and Mine Drainage Permit No. 7973M3.

Defendant, on or about March 12, 1976, intervened in that appeal, a proceeding totally unrelated to the zoning matters described herein. In the proceedings that were conducted before the Pennsylvania Environmental Hearing Board, the Supervisors delegated to the Association and to the other defendants the conduct of the appeal. The Supervisors took no significant part in the proceeding.

29. Despite the fact that the Association was the chief protagonist in the hearings and proceedings before the Pennsylvania Environmental Board, all of the costs and fees for expert witnesses, and disbursements and expenses related thereto, were borne and paid by the Supervisors and not by the other defendants.

30. Beginning in 1974, at a time not presently known to Miller, all of the defendants entered into a continuing combination and conspiracy, unreasonably to restrain interstate trade and commerce, and to injure Miller in its business and property, in violation of Section 1 of the Sherman Act, pursuant to which they did the things alleged in the foregoing paragraphs.

31. Pursuant to, and in furtherance of, their combination and conspiracy, the defendants have done those things which they combined and conspired to do, as alleged above, including the following:

(a) Defendants caused the issuance to Miller of the cease and desist order described below.

(b) The Board of Supervisors furnished the other defendants with valuable services, including engineering advices and aerial photographs, at no cost to defendants.

(c) Defendants used the Township's name and authority to prosecute the appeal to the Pennsylvania Environmental Hearing Board.

(d) Defendants usurped the Board of Supervisors' responsibility for determination of Miller's petitions for change of the zoning classification of the 12-acre plot and other related matters.

(e) Defendants prevented the Board of Supervisors from functioning as an independent body.

(f) Defendants prolonged Miller's proceedings before the Board of Supervisors, and made it difficult and expensive for Miller to pursue its rights.

(g) The Board of Supervisors permitted unjustified intervention in the proceedings by the other defendants, with knowledge that their purpose was collateral and unrelated to the rezoning proceedings, namely, to injure Miller in its business and property.

32. The defendants' illegal combination and conspiracy, as alleged above, has had the following effects:

(a) Miller has been prevented from quarrying in the 12-acre tract, and from selling stone and stone products in Pennsylvania and New Jersey.

(b) The flow of stone and stone products in interstate trade and commerce has been restrained.

(c) Competition in the sale of quarried stone and stone products between Miller and other quarry owners in Pennsylvania and New Jersey has been injured and suppressed.

(d) Miller has suffered, and will continue to suffer, substantial damages to its business and property.

(e) Miller has been prevented from the development of its property, and has been caused to expend large sums of money in protracted hearings and proceedings.

(f) Miller has lost profits and suffered a diminution in the value of its business and property.

33. As a result of the defendants' combination and conspiracy, Miller has suffered, and will continue to suffer, increased operating expenses and losses of profits. The 12-acre tract owned by Miller contains more than 2.7 million tons of stone which, if quarried and sold in the normal course of Miller's business, would produce revenues in excess of $7.6 million.

34. The defendants' illegal combination and conspiracy is continuing, and will continue unless enjoined by this Court.

WHEREFORE, plaintiff demands judgment against defendants, jointly and severally, as follows:

(1) Adjudging that the defendants' combination and conspiracy is an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

(2) Awarding to plaintiff treble the amount of the damages suffered by it in its business and property.

(3) Enjoining defendants, preliminarily until trial, and permanently thereafter, from continuing their unlawful combination and conspiracy.

(4) Ordering that the 12-acre plot be rezoned as QA-Quarry-Agriculture.

(5) Awarding to plaintiff the costs of this suit, including reasonable attorneys' fees.

(6) Awarding to plaintiff such other and further relief as to the Court seems just and proper.

COUNT II: VIOLATIONS OF SECTION 1, 2 AND 6 OF THE CIVIL RIGHTS ACT OF 1871.

35. Paragraphs 1 through 9 and paragraphs 12 through 34 are incorporated herein by reference.

36. This Count is brought on behalf of Miller against all defendants.

37. This Count is brought under the Fourteenth Amendment and under Sections 1, 2 and 6 of the Civil Rights Act of 1871 (42 U. S. C. §§ 1983, 1985(3), and 1986) to obtain injunctive relief and to recover damages and costs of suit, including reasonable attorneys' fees, for injuries sustained by Miller as a result of defendants' violations as hereinafter alleged.

38. This Court has jurisdiction of this Count under §§ 1331 and 1343 of the Judicial Code (28 U. S. C. §§ 1331, 1343). The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

39. All the defendants reside within this Judicial District.

40. Beginning in 1974, on a date presently unknown to Miller, and continuing to the present time, the Supervisors violated, and conspired to violate, with the other defendants, Section 1 of the Civil Rights Act of 1871 (42 U. S. C. § 1983), and misused and abused their official positions by permitting the other defendants, under color of law, to deprive Miller of rights, privileges and immunities under law in violation of the Fourteenth Amendment and Section 1 of the Civil Rights Act of 1871.

41. Beginning in 1974, at a date presently unknown to Miller, and continuing to the present, the Supervisors

violated, and conspired to violate, with the other defendants, the Fourteenth Amendment and Section 2 of the Civil Rights Act of 1871 (42 U. S. C. § 1985(3)), and misused and abused their official positions by permitting the other defendants, under color of law, to deprive plaintiff of the equal protection of the laws and equal privileges and immunities under the laws, in violation of the Fourteenth Amendment and Section 2 of the Civil Rights Act of 1871.

42. Beginning in 1974, at a date presently unknown to Miller, and continuing to the present, the Supervisors violated, and conspired to violate, with the other defendants, the Fourteenth Amendment and Section 6 of the Civil Rights Act of 1871 (42 U. S. C. § 1986), and misused and abused their official positions by permitting the other defendants, under color of law, to deprive Miller of the equal protection of laws and of equal privileges and immunities under the laws.

43. By reason of defendants' violations and conspiracy, Miller has suffered, and will continue to suffer, substantial injury to its business and property unless such violations and conspiracy are enjoined by this Court.

WHEREFORE, plaintiff demands judgment against defendants, jointly and severally, as follows:

(a) Adjudging that the aforesaid combinations and conspiracies are a violation of the Fourteenth Amendment and of Sections 1, 2 and 6 of the Civil Rights Act of 1871.

(b) Awarding to Miller the amount of damages suffered by it by reason of such violations and conspiracy.

(c) Enjoining defendants, preliminarily to trial, and permanently thereafter, from continuing their unlawful conspiracies.

(d) Ordering that Miller's 12-acre plot be rezoned as QA-Quarry-Agriculture.

(e) Awarding to plaintiff the costs of suit, including reasonable attorneys' fees.

(f) Granting to plaintiff such other and further relief as the Court deems just and proper.

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August 5, 1977

Supreme Court, U. S.
FILED
JUL 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1925.

MILLER & SON PAVING, INC.,

Petitioner,

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY, FRANK VIRNELSON, and HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, and WRIGHTSTOWN TOWNSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION BY RESPONDENTS WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY AND FRANK VIRNELSON.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1925.

MILLER & SON PAVING, INC.,

Petitioner,

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY, FRANK VIRNELSON, and HARRISON E. DOW, ALDAN-LEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, and WRIGHTSTOWN TOWNSHIP

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENTS WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY AND FRANK VIRNELSON.

Respondents Wrightstown Township Civic Association, George Donat, Margaret Perry and Frank Virnelson respectfully request that this Court deny a writ of certiorari to review the *per curiam* judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 2, 1979 and set forth in full in the Petition at Appendix B.

OPINIONS BELOW.

The opinions below are printed in Petitioner's Appendices B and D.[1]

JURISDICTION.

The jurisdictional requirements are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED.

I. Whether this Court should grant a writ of certiorari to review the Court of Appeals' decision affirming the dismissal of Count I of plaintiff's complaint alleging violations of Section 1 of the Sherman Act, 15 U. S. C. § 1, for failure to state a claim upon which relief can be granted, where plaintiff's complaint does not and cannot allege that any of the defendants (who are a Township, its Supervisors, the Township Civic Association and Township residents) had a commercial interest in the activities at issue.

II. Whether this Court should grant a writ of certiorari to review the Court of Appeals' decision affirming the dismissal of that part of Count II of plaintiff's complaint alleging violations of Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the Fourteenth Amendment to the United States Constitution, for failure to state a claim upon which relief can be granted, where plaintiff's complaint does not and cannot allege any deprivation of a constitutional right under the pleaded facts and where plaintiff never raised before the district court its latest theory of liability under the Civil Rights Act of 1871.

1. All references in this brief to portions of the "Appendix" refer to Petitioner's Appendix.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The statutes and ordinances involved, other than those set forth in the Petition at pages 2 and 3, include:

First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

53 Pa. Stat. Ann. § 10609 (Purdon's).

For the preparation of amendments to zoning ordinances, the procedure set forth in this article for the preparation of a proposed zoning ordinance shall be permissive. Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice. In the case of an amendment other than that prepared by the planning agency, the governing body shall submit each such amendment to the planning agency at least thirty days prior to the hearing on such proposed amendment to provide the planning agency an opportunity to submit recommendations. If, after any public hearing held upon an amendment, the proposed amendment is revised, or further revised, to include land previously not affected by it, the governing body shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment. If a county planning agency shall have been created for the county in which the city, borough, incorporated town or township adopting the ordinance is located, then at least thirty days prior to the hearing on the ordinance by the local governing body,

the city, borough, incorporated town or township planning agency shall submit the proposed ordinance to the county planning agency for recommendations.

COUNTERSTATEMENT OF THE CASE.

Plaintiff Miller & Son Paving, Inc. ("Miller"), a corporation engaged in the quarrying of stone in Wrightstown Township, Bucks County, Pennsylvania, brought this action on August 5, 1977 in the United States District Court for the Eastern District of Pennsylvania against the Wrightstown Township Civic Association ("Association"), George Donat, Margaret Perry and Frank Virnelson ("private defendants") and Harrison E. Dow, Aldanlee Spell, N. Kline Fisher and Wrightstown Township ("public defendants") alleging violations of Section 1 of the Sherman Act (15 U. S. C. § 1) (Count I) and Sections 1, 2 and 6 of the Civil Rights Act of 1871 (42 U. S. C. §§ 1983, 1985(3) and 1986) (Count II). Private defendants Donat, Perry and Virnelson are residents of Wrightstown Township. Public defendants Dow, Spell and Fisher are the Supervisors of Wrightstown Township. Miller alleged that a conspiracy among the private and public defendants, which has resulted in the denial of the rezoning of 12.853 acres adjacent to plaintiff's present quarry for use in additional quarrying activities, constitutes a restraint of trade in violation of Section 1 of the Sherman Act and a deprivation of constitutional rights in violation of the Civil Rights Act of 1871 and the Fourteenth Amendment to the United States Constitution.

As the Court of Appeals' decision states, Miller's claims are based on following alleged actions by the defendants with respect to Miller's quarrying activities:

> "the entry of a cease and desist order by the Township Supervisors in response to a complaint from the Civic Association that [Miller] had violated the Township's zoning ordinance in the operation of its quarry; the denial by the Supervisors of [Miller's] request, which was opposed by the Civic Association, for the rezoning of an additional tract of land owned by [Miller] to permit the conduct of quarrying thereon; and the filing of an administrative appeal by the Supervisors, allegedly on behalf of the Civic Association, from an order of the Pennsylvania Department of Environmental Resources, granting [Miller] a surface mining permit and mine drainage permit." (Appendix, pp. A5-A6)

Plaintiff nowhere alleges that any defendant had any commercial relationship to plaintiff or any commercial interest in the quarrying of stone. Moreover, there is no allegation that the alleged actions were contrary to the community's general welfare.

Upon consideration of briefs and oral argument supporting and opposing defendants' motions to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court granted defendants' motion. The trial court dismissed Miller's Sherman Act claim because of the admitted inability to allege any commercial relationship or purpose to defendants' purported actions. Miller's civil rights claim[2] was dismissed for failure to plead, or have any ability to plead under the alleged facts, a deprivation of constitutional rights.

The Court of Appeals for the Third Circuit heard oral argument on Miller's appeal of this decision on March 22, 1979. On April 2, 1979, the Court issued a *per curiam* decision affirming the district court on substantially the

2. Plaintiff's claims under 42 U. S. C. §§ 1985(3) and 1986 were never defended by plaintiff before the district court and the dismissal of those claims was not the subject of appeal.

same grounds relied upon by the lower court. The Court of Appeals also noted that Miller had attempted to argue a new theory concerning its claim under § 1983 which had never been raised in Miller's complaint, briefs or oral argument before the district court. The Court rejected this effort to raise new issues but also went on to deal with the legal inadequacy of the complaint. Several additional grounds for dismissal were briefed and argued to both the trial and appellate courts but neither court found it necessary to reach those issues in dismissing the complaint.

REASONS WHY THIS WRIT SHOULD BE DENIED.

The petition does not merit review by this Court because the Court of Appeals' decision does not conflict with this Court's prior decisions or the decisions of other courts of appeals and none of petitioner's contentions raise substantial legal issues.

I. The Sherman Act Claim.

District Judge McGlynn very accurately described the factual allegations in this case as amounting "to nothing more than a local zoning dispute" (Appendix, p. A15). In essence, plaintiff alleges that the private defendants sought to have the responsible Township authorities enforce the Township zoning ordinance and oppose rezoning of 12 acres of land which Miller had bought with the presumption that no one would care if the quarry were expanded.

Miller was wrong. The Township residents did fight because of the environmental and aesthetic nuisances created by the quarry and its threatened expansion. The dispute continues today, not only in this Court but in the Commonwealth Court of Pennsylvania and the Common Pleas Court of Bucks County, Pennsylvania. Miller has already won one battle with regard to its mining permits before the Environmental Hearing Board. In short, Miller has vigorously pursued a panoply of state court remedies which have brought vindication for both sides of the zoning dispute.

In Miller's federal court action, which seeks relief and raises issues virtually identical to those before the state courts, Miller alleges that defendants have conspired to destroy its business. Regardless of the truth of these allegations, there has always been agreement that defendants' motivations were totally non-commercial. Nowhere

in the record has Miller even suggested that any defendant or alleged co-conspirator might have the slightest interest in the price or marketing of quarry stone. As such, this zoning dispute is unquestionably political.

In this context, this Court and many other federal courts have determined that the Sherman Act has no applicability. Since *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493 and n. 15 (1940), this Court has stated that the Sherman Act was intended to control problems of "business competition". The *Apex* ruling was explained in *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 213 n. 7 (1959):

> "*Apex* recognized that the [Sherman] Act aimed at combinations having commercial objectives and applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."

This doctrine was reiterated in *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127, 141 (1961), in which opinion the Court found no Sherman Act liability where competitors allegedly sought to destroy plaintiff through attempts to influence the enforcement or passage of laws. The Court's succinct statement answers Miller's Petition here:

> "The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." (365 U. S. at 141).

Surely, if this doctrine, based on the First Amendment, applies to protect businessmen motivated by desires to destroy their competition, it should *a fortiori* apply where there is not the slightest commercial relationship or purpose alleged as to the defendants.

Federal district courts and courts of appeals have consistently reached this conclusion in every such case where the activities were outside the commercial arena. In *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F. 2d 650 (D. C. Cir.), *cert. denied*, 400 U. S. 965 (1970), the Court of Appeals dismissed the complaint where defendant's services in accrediting colleges was of a totally noncommercial nature. In two recent decisions by the Court of Appeals for the First Circuit, *Donnelly v. Boston College*, 558 F. 2d 634 (1st Cir. 1977) and *Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F. 2d 9 (1st Cir. 1978), *cert. denied*, 47 U. S. L. W. 3586 (1979), identical reasoning was applied to protect from antitrust scrutiny the law school admissions process and the application of the fairness doctrine to political opponents by the electronic media. Most recently, in *State of Missouri v. National Organization for Women, Inc.*, 467 F. Supp. 289 (W. D. Mo. 1979), the Court reviewed this body of law and dismissed plaintiff's Sherman Act claim based on defendant's boycott campaign against states that had failed to ratify the Equal Rights Amendment.

Thus, the federal courts have consistently applied the fundamental principle that the Sherman Act was intended to police the commercial arena, not the political arena. That principle has never been violated in any antitrust case of which the private defendants are aware. No federal court has found Sherman Act liability unless at least one defendant or co-conspirator was a competitor, customer or supplier having a commercial relationship to the plaintiff.

There is surely not the slightest reason offered by Miller to accept its novel theory proposed here. Indeed,

if Miller's theory were adopted, every political movement which sought to affect some business would be threatened with serious antitrust liability. That threat is inconsistent with the First Amendment and should be stopped, as it has been by the federal courts, before the lengthy processes of discovery and trial are permitted to chill the exercise of fundamental rights to petition the government.[3] *Franchise Realty Interstate Corporation v. San Francisco Local Joint Executive Board*, 542 F. 2d 1076, 1082 (9th Cir. 1976), *cert. denied*, 430 U. S. 940 (1977).

II. The Claim of Deprivation of Constitutional Rights.

Miller attempts to frame its attack on the dismissal of its claim of deprival of constitutional rights by focusing on what is known as the *Rotolo-Negrich* rule set forth by the Court of Appeals for the Third Circuit in *Rotolo v. Borough of Charleroi*, 532 F. 2d 920 (3d Cir. 1976) and *Negrich v. Hohn*, 379 F. 2d 213 (3d Cir. 1967). That rule requires that because federal court jurisdiction is based upon a claimed deprivation of a federal constitutional or statutory right, facts must be pleaded which set forth such a deprivation with more than a mere parroting of the words of the statute. While Miller's complaint does fail because of its failure to plead facts with any specificity, it fails for a more fundamental reason. Petitioner failed to present its current argument in any pleading, brief or oral argument presented to the district court.

Miller's Petition to this Court totally ignores one of the Court of Appeals' bases for its affirmance of the dismissal. Miller had argued to the Court of Appeals that it had stated

3. Another reason for dismissal of Miller's antitrust action, the state action exemption embodied in *Parker v. Brown*, 317 U. S. 341 (1943) and its progeny, was argued to both the trial court and court of appeals although not reached by either court. That doctrine remains as an alternative basis for supporting the judgment against plaintiff. *Jaffke v. Dunham*, 352 U. S. 280 (1957).

a cause of action based on a conspiracy to deny it a neutral and detached adjudication. The Court of Appeals found, after a review of the record before the district court, that such a claim was not "focused upon by plaintiff as the basis for its demand for relief under § 1983" (Appendix, p. A7).

Nowhere in Miller's Petition is there a challenge to this finding by the Court of Appeals. In any event, there would be no effective challenge to the Court's holding since Miller never claimed a deprivation of a constitutional right to a neutral adjudication until its brief to the Court of Appeals was filed. Miller's complaint simply claimed that it had been deprived of "equal protection of the laws and of equal privileges and immunities under the laws." When Judge McGlynn asked Miller's counsel to explain what constitutional deprivation was complained of, the response was simply that Miller had property rights in its quarry operation and defendants had deprived Miller of those property rights (Appendix, p. A15). It was only after defendants and Judge McGlynn had indicated to Miller the fallacy of its argument that Miller's counsel attempted to shift gears and argue a new theory never argued to the district court. This failure to articulate a theory before the district court by which plaintiff seeks reversal here alone warrants affirmance of the decisions below. *Hormel v. Helvering*, 312 U. S. 552, 556 (1941); *Singleton v. Wulff*, 428 U. S. 106, 120 (1976); *Newark Morning Ledger Co. v. United States*, 539 F. 2d 929, 932 (3d Cir. 1976).

Even if this Court were to overlook this change of theory and examine Miller's new theory, it cannot withstand scrutiny when compared to the factual allegations of the complaint. Miller's complaint challenges the actions of the Board of Supervisors in its role as the body author-

ized to determine issues of rezoning. 53 Pa. Stat. Ann. § 10609 (Purdon's).[4] The actions of a Board of Supervisors when considering such rezoning requests are "legislative". *Board of Commissioners of McCandless Township v. Beho Development Company,* 16 Pa. C. 448, 332 A. 2d 848, 851 (1975). As that decision notes, under Pennsylvania law, not even a reviewing state court may order rezoning of a parcel of land. Only the Board of Supervisors has that power in its legislative capacity.

The power of federal courts in reviewing such local decisions is even more limited. As this Court and a number of courts of appeals have held, federal courts may only review challenged zoning decisions to determine whether there has been a "clearly arbitrary and unreasonable" decision, "having no relationship to the public health, safety, morals or general welfare." *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 395 (1926); *Ellentuck v. Klein,* 570 F. 2d 414, 430 (2d Cir. 1978); *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F. 2d 956, 960 (1st Cir. 1972); *Burns v. City of Des Peres,* 534 F. 2d 103, 108 (8th Cir.), *cert. denied,* 429 U. S. 861 (1976); *South Gwinnett Venture v. Pruitt,* 491 F. 2d 5 (5th Cir. *en banc*), *cert. denied,* 419 U. S. 837 (1974).

Miller makes no allegation that any state actions were arbitrary or capricious. No such allegation could have been made since it is plain even to Miller that the Supervisor's decision had a rational relationship to the environmental welfare of the community.

Miller's allegations amount to nothing more than a complaint that it lost its sought-after rezoning. There is

4. Rezoning of the 12 acre parcel has been and remains Miller's goal in its legal proceedings before this Court, before the Board of Supervisors and before the Pennsylvania state courts (Plaintiff's Complaint, ¶¶ 20-23, 26 and prayer for relief, Appendix, pp. A21-26).

no complaint that it was denied any particular procedural due process right. No such allegation could be made since Miller recognizes that it was given a full opportunity over several months to present all its arguments to the Board of Supervisors. In the end, the Supervisors made a decision.[5] That is their duty under Pennsylvania law. It so happens that the Supervisors sided with the Township's citizens. That surely does not constitute a deprivation of due process under any theory ever set forth by this Court.

Miller has brought this action, and presented it to the highest Court, to seek leverage in its litigation of identical issues before the state courts of Pennsylvania. No leverage should be granted by this Court since Miller has stated no cause of action under any theory ever accepted by this Court. Miller has raised no substantial legal issue and has pointed to no conflicting decisions among the courts of appeals.

5. The private and public defendants also argued to the district court and court of appeals that the Board of Supervisors were absolutely immune from damage liability for their actions alleged here. *Tenney v. Brandhove,* 341 U. S. 367 (1951); *Jonnet v. Bodick,* 431 Pa. 59, 244 A. 2d 751 (1968). *Cf. Stump v. Sparkman,* 435 U. S. 349 (1978). The immunity of the public defendants would also protect the private defendants from liability. *Hazo v. Geltz,* 537 F. 2d 747, 749 (3d Cir. 1976); *Hill v. McClellan,* 490 F. 2d 859, 860 (5th Cir. 1974). Neither court reached this issue in dismissing Miller's complaint (Appendix, pp. A7 and A17).

CONCLUSION.

For all the foregoing reasons, this Court should deny Miller's Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1925.

MILLER & SON PAVING, INC.,

Petitioner,

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY, FRANK VIRNELSON, and HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, and WRIGHTSTOWN TOWNSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION BY RESPONDENTS WRIGHTSTOWN TOWNSHIP, HARRISON E. DOW, ALDENLEE SPELL AND N. KLINE FISHER, INDIVIDUALLY AND AS SUPERVISORS OF WRIGHTSTOWN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA.

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IN THE

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Respondents.

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Respondents Wrightstown Township, Harrison E. Dow, Aldenlee Spell and N. Kline Fisher, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, respectfully request that this Court deny a writ of certiorari to review the per curiam judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 2, 1979 and set forth in full in the Petition at Appendix B.

OPINIONS BELOW.

The opinions below are printed in Petitioner's Appendices B and D.

JURISDICTION.

The jurisdictional requirements are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED FOR REVIEW.

I. Does a Complaint, which alleges a local zoning dispute, state a federal antitrust cause of action where:

(a) no commercial relationship among any of the parties or co-conspirators is alleged; and

(b) the governmental defendants are charged solely with deciding a zoning matter entirely within the authority granted to them under state law?

II. Does a Complaint, which alleges a local zoning dispute, state a federal cause of action against local governmental officials acting pursuant to authority of state law, under Section 1 of the Civil Rights Act of 1871 and the Fourteenth Amendment to the Constitution where:

(a) no allegation of a deprivation of civil rights and no arbitrary or capricious conduct by any defendant is made; and

(b) no allegation of a discriminatory purpose or effect is made?

STATUTES INVOLVED.

§ 601 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10601:

The governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act.

§ 603 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10603:

Zoning ordinances may permit, prohibit, regulate, restrict and determine:

(1) Uses of land, watercourses and other bodies of water;

(2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures;

(3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards and other open spaces and distances to be left unoccupied by uses and structures;

(4) Density of population and intensity of use.

In addition, zoning ordinances may contain:

(1) Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) Provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency, pursuant to express standards and criteria set forth in the ordinances;

(3) Provisions for the administration and enforcement of such ordinances; and

(4) Such other provisions as may be necessary to implement the purposes of this act.

§ 604 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10604:

The provisions of zoning ordinances shall be designed:

(1) To promote, protect and facilitate one or more of the following: the public health, safety, morals, general welfare, coordinated and practical community development, proper density of population, civil defense, disaster evacuation, airports, and national defense facilities, the provisions of adequate light and air, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, public grounds and other public requirements, as well as

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers. Zoning ordinances shall be made in accordance with an overall program, and with consideration for the character of the municipality, its various parts and the suitability of the various parts for particular uses and structures.

§ 605 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10605:

In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district, except that additional classifications may be made within any district:

(1) For the purpose of making transitional provisions at and near the boundaries of districts, and

(2) For the regulation, restriction or prohibition of uses and structures at or near (i) major thoroughfares, their intersections and interchanges, and transportation arteries, (ii) natural or artificial bodies of water, (iii) places of relatively steep slope or grade, (iv) public buildings and public grounds, (v) aircraft, helicopter, rocket, and spacecraft facilities, (vi) places having unique historical or patriotic interest or value, (vii) flood plain areas and other places having a special character or use affecting and affected by their surroundings. As among several classes of zoning districts, the provisions for permitted uses may be mutually exclusive, in whole or in part.

§ 609 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10609:

For the preparation of amendments to zoning ordinances, the procedure set forth in this article for the preparation of a proposed zoning ordinance shall be permissive. Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice. In the case of an amendment other than that prepared by the planning agency, the governing body shall submit each such amendment to the planning agency at least thirty days prior to

the hearing on such proposed amendment to provide the planning agency an opportunity to submit recommendations. If, after any public hearing held upon an amendment, the proposed amendment is revised, or further revised, to include land previously not affected by it, the governing body shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment. If a county planning agency shall have been created for the county in which the city, borough, incorporated town or township adopting the ordinance is located, then at least thirty days prior to the hearing on the ordinance by the local governing body, the city, borough, incorporated town or township planning agency shall submit the proposed ordinance to the county planning agency for recommendations.

§ 609.1 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10609.1:

A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 1004. The governing body shall commence a hearing thereon within sixty days of this request as provided in section 1004. The curative amendment shall be referred to the planning agency or agencies as provided in section 609 and notice of the hearing hereon shall be given as provided in section 610 and in section 1004. The hearing shall be conducted in accordance with subsection (4) to (8) of section 908 and all references therein to the zoning hearing board shall, for purposes of this section be references to the governing body.

§ 614 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10614:

For the administration of a zoning ordinance, a zoning officer, who may not hold any elective office in the municipality, shall be appointed. The zoning officer shall administer the zoning ordinance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance.

§ 617 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10617:

In case any building, structure, or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws, the governing body or, with the approval of the governing body, an officer of the municipality, in addition to other remedies, may institute in the name of the municipality any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation.

§ 903 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10903:

The membership of the board shall consist of three residents of the municipality appointed by the governing body. Their terms of office shall be three years and shall be so fixed that the term of office of one member shall expire each year. The board shall promptly notify the governing body of any vacancies which occur. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members of the board shall hold no other office

in the municipality, except that no more than one member of the board may also be a member of the planning commission.

§ 909 of the Pennsylvania Municipalities Planning Code, 53 P. S. § 10909:

The board shall hear and decide appeals where it is alleged by the appellant that the zoning officer has failed to follow prescribed procedures or has misinterpreted or misapplied any provision of a valid ordinance or map or any valid rule or regulation governing the action of the zoning officer. Nothing contained herein shall be construed to deny to the appellant the right to proceed directly in court, where appropriate, pursuant to Pa. R. C. P., section 1091 to 1098 relating to mandamus.

§ 510 of the Pennsylvania Second Class Township Code, 53 P. S. § 65510:

The general supervision of the affairs of the township shall be in the hands of three registered electors of the township, who shall be styled township supervisors.

COUNTER STATEMENT OF THE CASE.

The Complaint in this action alleged that defendants violated Section 1 of the Sherman Act, Sections 1, 2 and 6 of the Civil Rights Act of 1871, and the Fourteenth Amendment of the United States Constitution.[1] Named as defendants in the Complaint are Wrightstown Township and its three Supervisors, Harrison E. Dow, Aldenlee Spell and N. Kline Fisher, (collectively referred to as the "Governmental defendants"), who file this brief in opposition to the petition for Writ of Certiorari to the United States

1. Plaintiff subsequently abandoned its claims under Sections 2 and 6 of the Civil Rights Act of 1871.

Court of Appeals for the Third Circuit filed by plaintiff Miller & Son Paving, Inc. (hereinafter "Miller"). Also named as defendants are Wrightstown Township Civic Association, George Donat, the President of the Civic Association and two individuals who reside in Wrightstown Township, Margaret Perry and Frank Virnelson.

The factual allegations of the Complaint state nothing more than a routine zoning dispute which Miller has attempted to make into a federal antitrust suit. Miller owns two plots of land in Wrightstown Township—a 45 acre plot and a 12 acre plot. Miller has owned and quarried the 45 acre plot, which is zoned QA Quarry-Agriculture, since 1959. (Complaint ¶ 14, A-20). In about January, 1973, Miller purchased the 12 acre plot, which is zoned R-2 Residential Agriculture and which abuts the 45 acre plot. (Complaint ¶ 15, A-20). Miller was aware that quarrying was prohibited by Wrightstown Township's zoning ordinances at the time it purchased the 12 acre plot.

Miller's complaint is that it did not receive favorable zoning rulings which would have permitted it to enlarge its stone quarry into the 12 acre plot, and that that Township and its Supervisors, as the legislative arm of the Township, have attempted to stop it from violating the Township's zoning ordinances.[2] Plaintiff does not allege that the governmental defendants conspired for personal gain. Nor does plaintiff allege that the governmental defendants conspired to favor a competitor of plaintiff. In fact, none of defendants have any commercial relationship to plaintiff. Plaintiff's complaint merely recites a history

2. It is important to note that Miller has been quarrying under the protection of the laws of Wrightstown Township for many years. A portion of the township has been zoned so to permit several quarries, including Miller, to conduct their businesses. There is no allegation that defendants have attempted to alter the existing zoning ordinances which permit Miller to quarry in its 45 acre plot.

of zoning litigation which did not have the result plaintiff desired.

Miller's complaint involves three incidents. First, it is alleged that in September, 1974, the Supervisors, acting in response to a citizen's complaint, ordered plaintiff to cease certain activities on its 45 acre plot, and that plaintiff appealed from that order to the Zoning Hearing Board of Wrightstown Township. (Complaint ¶ 18, A21). After several hearings, the Board found for Miller on two alleged violations but found against Miller on other violations. (Complaint ¶ 19, A21). An appeal from that decision is still pending in Pennsylvania courts. Thus, this first allegation is merely that a citizen of Wrightstown Township accused plaintiff of certain zoning violations; that the Township and the Supervisors issued a cease and desist order against plaintiff; that the Zoning Hearing Board (a body completely independent of the Supervisors) held hearings; that the Board found for the plaintiff on two of the allegations and against plaintiff on an unspecified number of other violations; and that appeals of this decision were filed in state courts.[3]

The second incident alleged in the Complaint concerns Miller's application for an amendment to the applicable zoning ordinance by which it sought to expand its quarry into the 12 acre plot which is and was zoned R-2 Residential-Agriculture. (Complaint ¶¶ 21 to 27, A22-A-23). The Complaint states that the Supervisors permitted plaintiff to try to settle the case with the Civic Association and other defendants. (Complaint ¶ 21, A22). Plaintiff concluded that the attempts to settle the matter

3. The Court of Common Pleas for Bucks County affirmed this decision of the Zoning Hearing Board by order dated November 18, 1977. Miller appealed this order to the Pennsylvania Commonwealth Court which also affirmed the finding of the Zoning Hearing Board.

were "unjustifiable" and rejected them. (Complaint ¶ 22, A22). It is alleged that thereafter plaintiff and the Supervisors reached a "mutually agreeable basis" for rezoning the 12-acre plot but that the Civic Association objected and no agreement was concluded. (Complaint ¶¶ 22, 23, A22-A23). This portion of the Complaint ends with the allegation that the Town Solicitor was replaced by another attorney who was assigned the job of handling the litigation. (Complaint ¶¶ 24 to 26, A23). Miller's request for a change in Zoning was denied. (Complaint ¶ 27, A23).[4] Thus, this portion of the Complaint alleges that plaintiff lost an attempt to change the zoning laws. There is no allegation that the zoning ordinances were unfair or that the Supervisors acted unreasonably, capriciously, or arbitrarily.

Finally, the third incident alleged in the Complaint is that the Supervisors caused an appeal to be filed with the Pennsylvania Environmental Hearing Board from the granting to plaintiff of certain mining permits, and that "defendant" (presumably the Civic Association but not actually identified in the complaint) intervened. (Complaint ¶ 28, A23). The Supervisors allegedly took no significant part in the proceeding and supposedly paid for unspecified costs and fees incurred. (Complaint ¶ 29, A24). The Pennsylvania Environmental Hearing Board dismissed the defendants' appeal and mining permits were issued to Miller. Thus, this entire issue is now moot.

Conspicuously absent from these allegations is any suggestion that the Supervisors acted outside their delegated authority. There is no allegation that the Township, the Supervisors or any other defendant acted so as to gain personally or to damage plaintiff's competitive position. No commercial relationship between or among any of the

4. Miller appealed this ruling to the Court of Common Pleas for Bucks County which appeal is pending.

parties is alleged. There is no allegation of arbitrary or capricious action by the governmental defendants or other defendants. There is no allegation that the acts of the governmental defendants or other defendants were intentionally discriminatory or even discriminatory in effect.

In short, the complaint alleges that the government of Wrightstown Township did not permit plaintiff to enlarge its quarrying business and took other acts to enforce its zoning regulations and that the citizens of Wrightstown Township actively supported this decision. What Miller seeks from the federal courts is an advantage not extended to its competitors: being permitted to quarry in an area zoned for residential use and to quarry in a manner prohibited by zoning ordinances.

The governmental defendants and the other defendants filed motions to dismiss the complaint on numerous grounds. The district court granted defendants' motion to dismiss. *Miller & Son Paving, Inc. v. Wrightstown Township Civic Association*, 443 F. Supp. 1268 (E. D. Pa. 1978). The Court of Appeals for the Third Circuit affirmed (A 10 *et seq.*).

REASONS WHY THIS WRIT SHOULD BE DENIED.

The petition for certiorari does not merit review by this Court because the decisions below are in accord with prior decisions of this Court and do not conflict with decisions of other courts.

I. A Complaint Which Alleges Nothing More Than a Local Zoning Dispute Does Not State a Cause of Action Under the Sherman Act.

A. No Commercial Relationship Exists Between the Parties and the Plaintiff Has Not Pleaded That Any Alleged Acts of Defendants Have Put It at a Competitive Disadvantage.

Miller is urging this Court to adopt a rule which would apply the Sherman Act to every concerted activity which has an impact on the business or property of another. This rule is totally unsupported in law, and, if it were adopted, the Sherman Act would apply to every crime or tort committed by two or more persons that had some impact on another's property or business.[5] But the Sherman Act was not intended by Congress to be a general grant of federal jurisdiction to every person who was injured by the joint activity of two or more people.

This Court has long ruled that the Sherman Act was intended by Congress to codify the then existing common law of unfair competition and, as such, extends to conspiracies which have the effect or which are committed with the intent to restrain competition. In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940) the Court concluded that the intention of Congress in passing the Act:

5. For example, if every conspiracy which injures the business or property of another were a violation of the Sherman Act, then every bank robbery committed by two or more persons would be an antitrust violation.

> "was the prevention of restraints to free competition in business and commercial transactions which tended to restrain production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. . . ." 310 U. S. at 493.

This Court further stated:

> "Underlying and implicit in all [the cases] is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would be purchasers.'" 310 U. S. at 513.

See also, *Standard Oil Co. v. United States,* 221 U. S. 1 (1911).

This Court's ruling that the antitrust laws are intended only to apply to conspiracies which damage free competition has been uniformly applied by lower courts, for example, *Marjorie Webster Junior College v. Middle Atlantic States Association of Colleges and Secondary Schools,* 432 F. 2d 650 (D. C. Cir. 1970), *cert. denied,* 400 U. S. 965 (1970) and *Donnelly v. Boston College,* 558 F. 2d 634 (1st Cir. 1977).

It is of utmost significance that Miller does not allege that defendants have imposed upon it, either intentionally or unintentionally, an unreasonable competitive restraint. Furthermore, no commercial relationship whatsoever is alleged to have existed between Miller and any of the defendants. The complaint merely states that the governmental defendants applied existing zoning ordinances and prevented plaintiff from expanding its business. The complaint itself states that plaintiff has been conducting its business on the "45-acre plot" since 1959. (Complaint ¶ 14, A15).

Miller attempts to portray its own efforts to circumvent existing zoning ordinances and therefore secure advantages not given to its competitors as attempts by defendants to "destroy its business". Plaintiff's entire case boils down to a complaint that it was not given a special privilege. This complaint obviously does not state a cause of action under the antitrust laws and the Court of Appeals and the District Court have so held.

B. The Complaint Alleges Only That the Governmental Defendants Acted Entirely Within Their Legal Authority in Enforcing Zoning Ordinances and in Deciding Miller's Request for a Change of Zoning; Their Actions Are Thus Beyond the Scope of the Antitrust Laws.

1. The *Noerr-Pennington* Doctrine.

The only allegations of a "conspiracy" under the antitrust laws in this case relate to the actions of public officials in the performance of their duties and responsibilities as members of an elected governmental body who considered the wishes of their constituents when they made decisions in zoning matters. Thus, the alleged "conspiracy" amounts to nothing more than a charge that the Supervisors did what elected officials are supposed to do—consider the view of their constituents.

Such acts by public officials are not violations of the antitrust laws under the doctrine known as *Noerr-Pennington.* As this Court held in *United Mine Workers of America v. Pennington,* 381 U. S. 657 (1965):

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to elimi-

nate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U. S. at 670.

See also *Eastern Railroad President's Conference v. Noerr Motor Freight,* 365 U. S. 127 (1961).

A clear case is presented in the instant action for the application of the *Noerr-Pennington* doctrine. Here, no allegations of personal involvement on the part of the governmental defendants is alleged. The Supervisors are only alleged to have performed their public duties, and the private defendants are alleged only to have pressed their views on an obviously important local issue before their elected officials. It must be stressed that Miller has not alleged that defendants made an attempt to interfere directly with the business relationships of a competitor, as no competitive relationship exists in this case. Moreover, it has not been alleged that defendants denied Miller free and unlimited opportunity to express its position. Indeed, the complaint clearly states that plaintiff has had and continues to have numerous opportunities to argue its position before local governmental bodies and Pennsylvania courts, none of which have been named as defendants or co-conspirators. (Complaint ¶¶ 19, 21, 28, A16, 17, 18). It was Miller itself which instigated most of the adjudicatory proceedings in this case; it has not been the passive victim of litigation brought against it.

2. The Doctrine of *Parker v. Brown.*

This Court has long recognized that basic constitutional concepts of federalism demand that federal courts do not apply the federal antitrust laws to the workings of state governments. This doctrine was first established in *Parker v. Brown,* 317 U. S. 341 (1942) where officials of the government of the State of California were sued by a

private plaintiff who alleged that they violated the Sherman Act when they applied state law. This Court rejected those allegations:

> "In a dual system of government in which under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed." 317 U. S. at 351.

In the case *sub judice,* the governmental defendants are alleged to have violated the Sherman Act by their actions in applying the Pennsylvania Municipalities Planning Code. 53 P. S. § 10101, *et seq.* The actions of the governmental defendants are nothing more than the actions of a local government ruling on routine zoning matters. As such, the governmental defendants are protected by the rule as stated in *Parker.*

There can be no doubt that actions of the governmental defendants which are alleged to be violations of the Sherman Act were taken entirely pursuant to the authority of Pennsylvania statutory law. Under the Municipalities Planning Code (the "Code"), Wrightstown Township and its Supervisors have the clear authority and duty to rule on zoning matters. Such rulings are taken pursuant to a complex regulatory scheme of land-use management, and the decisions of local governmental officials, such as the defendants herein, are subject to the constant review of superior state agencies and state courts.

This Court has reaffirmed and explained the doctrine of *Parker v. Brown* in numerous cases, the most recent of which is *City of Lafayette, La. v. La. Power and Light Company,* 435 U. S. 389 (1978). The Court concluded that a local governmental unit has immunity from the antitrust laws where its activities are undertaken pursuant

to authority of the state acting as sovereign and went on to enunciate the test for determining whether or not a local municipality has acted pursuant to authority given to it by the state acting as sovereign and therefore enjoys immunity under *Parker v. Brown*:

> "While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'. 532 F. 2d, at 434." 435 U. S. at 415.

The Supreme Court of Pennsylvania has noted that when Supervisors of a Second Class Township in Pennsylvania enforce zoning regulations "there can be no question that the supervisors' actions were taken in the course of their duties and within the scope of their authority". *Jonnet v. Bodick*, 431 Pa. 59, 62 (1968). Even a cursory review of the Pennsylvania Municipalities Planning Code (53 P. S. § 10101, *et seq.*) will show that the Commonwealth of Pennsylvania has comprehensively regulated land use. The Pennsylvania Municipalities Planning Code clearly authorizes and even mandates the acts of the governmental defendants complained of in the complaint. See Sections 601, 604, 605, 609.1 and 617 (53 P. S. §§ 10601, 10604, 10605, 10609.1 and 10617). It is obvious that the "legislature contemplated the kind of action completed of" herein. *City of Lafayette, supra.*

If this Court were to interfere with the Commonwealth of Pennsylvania's pervasive supervision of zoning

regulation and enforcement, the constitutional foundation of federalism would be severely damaged. It is just this violation of sovereign state power that *Parker v. Brown, supra,* was meant to prevent. No clearer case can be imagined for the judicial restraint of federal power. Accordingly, the decisions of the lower courts herein are in complete accord with this and other courts' decisions construing the doctrine of *Parker v. Brown, supra.*

II. The Complaint Clearly Does Not State a Cause of Action Under the Civil Rights Act or the Constitution of the United States.

A. Plaintiff's Claims Relating to Zoning Do Not Present a Substantial Federal Question and Cannot Be Heard in Federal Court.

The Civil Rights Acts were passed to insure that no person would be discriminated against because of his race, national origin, religion or other class-based reason. In the instant case a corporation is suing a township and its supervisors for merely carrying out their duties under Pennsylvania law to enforce existing residential neighborhoods. The complaint does not make any allegation that governmental defendants applied zoning in a discriminatory manner. Miller was treated exactly like other quarries in Wrightstown Township and there is no allegation to the contrary.

Numerous cases have held that zoning involves the exercise of judgment which is legislative in character and not subject to federal court review unless the plaintiff can show that the defendants acted arbitrarily. *South Gwinett Venture v. Pruitt*, 491 F. 2d 5 (5th Cir. 1974); *Blackman v. City of Big Sandy, Texas*, 507 F. 2d 935 (5th Cir. 1975); *Stone v. City of Maitland*, 446 F. 2d 83 (5th Cir. 1971); *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F. 2d 956 (1st Cir. 1972).

This Court discussed permissible features of zoning at length in *Village of Belle Terre v. Boraas*, 416 U. S. 1, 9 (1974) by stating:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Thus, zoning is an aspect of the State's constitutional police power, and a federal court may not interfere with a local state government in its zoning activities without undermining the constitutional scheme of federalism.

B. The Allegations of Civil Rights Act Violations Were Properly Dismissed.

There is no doubt that the Complaint in this action fails to allege a cause of action under the civil rights statutes. There is no claim of lack of notice or that the hearing procedures awarded plaintiff were inadequate or unfair. Indeed, plaintiff admits in Paragraph 13 of his complaint that several hearings were held concerning the order from the Township for plaintiff to cease and desist from certain activities in connection with quarrying in the 45-acre plot. The plaintiff also admits in Paragraph 21 of the complaint that eight separate hearings were held in connection with the plaintiff's petition to rezone its 12-acre plot. Plaintiff further admits in Paragraph 29 of the complaint that hearings and proceedings took place before the Pennsylvania Environmental Board. There is no allegation anywhere in the complaint of any arbitrary action by any of the defendants. In fact, as the courts below recognized, there are no specific allegations of any kind in the Complaint. For example, paragraph 23 refers to "objections" by the "defendants" without identifying which defendants are being accused. Paragraph 28 states that "defendant . . . intervened in that appeal" again without any specific reference. Paragraph 28 is also ambiguous in that it charges that the "Supervisors took no significant part in the proceeding" without specifying what was supposedly done (or not done) and how these alleged actions supposedly violate plaintiff's civil rights. Most importantly, the complaint does not specify what due process rights Miller has been denied or even that there was a denial of due process.

Conclusory allegations of this sort simply do not allege the discriminatory acts necessary to state a cause of action under the civil rights statute. *Rotolo v. Borough of Charleroi*, 532 F. 2d 920 (3d Cir. 1976); *Negrich v. Hohn*, 379 F. 2d 213 (3d Cir. 1967).[6]

6. While the Civil Rights Act creates a federal cause of action, the immunity of particular public officials from liability is determined by reference to the principles of state common law. *Tenney v. Brandhove*, 341 U. S. 367 (1951); *Dombrowski v. Eastland*, 387 U. S. 82 (1967); *Bauers v. Heisel*, 361 F. 2d 581 (3d Cir. 1966). In Pennsylvania, immunity is well established for township supervisors as high governmental officials. In *Jonnet v. Bodick*, 431 Pa. 59 (1968), the Supreme Court of Pennsylvania in a zoning action held:

> "There are no more important officers in second class townships than the supervisors. They exercise the entire legislative and executive powers of the municipality and there can be no doubt of the fact that they do indeed exercise policy-making functions. We hold that the supervisors are within the class of 'high public officials' protected by absolute privilege." 431 Pa. at 62 [emphasis added]

The Supreme Court of Pennsylvania has recently reaffirmed the principle in *DuBree v. Commonwealth of Pennsylvania*, 393 A. 2d 293 (1978) that the public has an important interest in shielding

C. No Conceivable Fourteenth Amendment Claim Has Been Alleged.

In *Washington v. Davis,* 426 U. S. 229 (1976), this Court discussed the purpose of the equal protection clause of the Fourteenth Amendment holding:

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." 426 U. S. at 239.

The Court recognized that consideration of race normally introduces a capricious and irrelevant factor working an invidious discrimination. *Anderson v. Martin,* 375 U. S. 399 (1964); *Germann v. Kipp,* 429 F. Supp. 1323 (W. D. Mo. 1977). Obviously, plaintiff Miller & Son Paving, Inc., does not allege any racial discrimination on the part of defendants.

But even more than this, Miller cannot and did not allege any discrimination of *any kind* against it. Miller's primary complaint is that Wrightstown Township and its Supervisors refused to change the zoning of a particular

6. (Cont'd.)
public officials with decision making authority from the threat of personal liability.

The necessity for this immunity is seen most clearly in the instant situation. The Supervisors, who are given the power, obligation and duty under Pennsylvania law to protect their township and the citizens of their township by the proper use of zoning, have refused to permit plaintiff to expand its quarry operations in the township. After hearings and upon presentation of all positions, the Supervisors made the decision that state law authorizes and compels them to do. If every party who loses a zoning case can bring the Supervisors to court for their refusal to agree with them, then the Supervisors will not be able to decide openly and freely what is best for their constituents. The immunity of high public officials, which has long been established in Pennsylvania, serves an important democratic principle. This court has established that such immunity doctrines are to be applied by federal courts in civil rights cases. Thus, the decision of the Court of Appeals and the District Court were clearly in accord with applicable law.

piece of land in accordance with plaintiff's wishes. If it is conceivable that there could be an equal protection claim as to some aspects of zoning, this certainly is not such a situation. There are no allegations, as indeed it is not true, that Wrightstown Township and the Supervisors changed the zoning on the land where Miller is presently mining forcing it to shut down its operations. All that defendants are charged with doing is enforcing valid land-use regulations. Far from invidious discrimination, there is no discrimination alleged at all.

This Court has held that zoning ordinances "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" are a proper exercise of zoning power. *Village of Belle Terre v. Boraas,* 416 U. S. 1, 9 (1974). This Court, in *County Board of Arlington County, Virginia v. Richards,* 434 U. S. 5 (1977), found that a zoning ordinance prohibiting non-residents from parking in a community was constitutional. The Court concluded that social and environmental objectives are not prohibited by the Constitution, stating:

> "The Constitution does not outlaw these social and environmental objectives, nor does it presume distinctions between residents and non-residents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington's rationally promote the regulation's objectives. . . . On its face, the Arlington ordinance meets this test." 434 U. S. at 7.

Plaintiff has not alleged in its Complaint that the acts of Wrightstown Township and its Supervisors are arbitrary or capricious. Therefore, for this reason alone, the Fourteenth Amendment cannot apply to plaintiff's claim.

In addition, of course, there is no allegation in Miller's Complaint that the acts of Wrightstown Township and the

Supervisors were done with the intent to discriminate against plaintiff. Accordingly, the claims under the Fourteenth Amendment were properly dismissed under this Court's rulings in *Arlington Heights v. Metropolitan Housing Corporation*, 429 U. S. 252 (1977) and *Washington v. Davis*, 426 U. S. 229 (1976).

CONCLUSION.

For all the reasons expressed herein, the governmental defendants submit that there is no doubt that the complaint in this case was properly dismissed. There exists no issue of law pertinent to this case which is unsettled. There is no conflict among the circuits with regard to this case. In short, the plaintiff has attempted to make a federal case out of a zoning dispute and the Court of Appeals merely reached the obvious conclusion that dismissal of the complaint was mandated by numerous well-established rules of law.

Respectfully submitted,

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